

SUPREME COURT OF ARKANSAS

Opinion Delivered November 15, 2012

IN RE ADOPTION OF ARK. R. CRIM.
P. 8.7 AND ARK. R. EVID. 411 AND
OTHER MATTERS

PER CURIAM

We published for comment proposed rules changes recommended by the Supreme Court Committee on Criminal Practice. *In re Recommendations of the Criminal Practice Committee*, 2012 Ark. 295 (per curiam). Of the rules proposed, we adopt Ark. R. Crim. P. 8.7 (Use of Video Conferences in Pretrial Proceedings) and Ark. R. Evid. 411 (Admissibility of Evidence of Victim's Prior Sexual Conduct). These rules are published below and are effective January 1, 2013.

Related to the adoption of Rule 411, we amend Ark. R. App. P.–Crim 3 (a), as set out below. This amendment is effective January 1, 2013, and this subsection of the rule is republished.

At this time, we decline to adopt the third item that was published for comment relating to interlocutory appeals of juvenile transfer orders. *See* 2012 Ark. 295, at 3–7.

We express our gratitude to the members of the Criminal Practice Committee for their work.

ARKANSAS RULES OF CRIMINAL PROCEDURE**Rule 8.7. Use of Video Conferences in Pretrial Proceedings.**

(a) If the defendant is confined in a jail, prison, or other detention facility, a first appearance as provided in Rules 8.1 and 8.3 or a pretrial release inquiry as provided in Rule 8.4 may be conducted by video conference as provided in this rule.

(b) Any video conferencing system used under this rule must meet all the following requirements:

(1) All participants in the proceeding must be able to see, hear, and communicate with each other simultaneously during the proceeding.

(2) All participants in the proceeding must be able to see and hear any witnesses who may testify in the proceeding.

(3) All participants in the proceeding must be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding, either by video, facsimile, or other method.

(4) The video quality of the video conferencing system must be adequate to allow the participants to observe each other's demeanor and nonverbal expressions as well as the demeanor and nonverbal expressions of any witnesses who testify in the proceeding.

(5) If the defendant is represented by an attorney, the attorney shall, upon request, be provided with the opportunity for confidential communication with the

defendant.

(c) As used in this rule, the “participants in the proceeding” mean the judicial officer conducting the proceeding, the prosecuting or deputy prosecuting attorney, the defendant, and, if the defendant is represented by an attorney, the attorney.

(d) An attorney representing a defendant during a video conference may elect to be present either in the courtroom with the presiding judicial officer or in the place where the defendant is confined. With the approval of the court, an attorney may represent a defendant during a video conference from a location other than the courtroom or the place of detention.

Reporter’s Notes, 2012.

This rule was added in 2012 to provide guidance on the use of videoconferencing equipment in pretrial proceedings.

ARKANSAS RULES OF EVIDENCE

Rule 411. Admissibility of evidence of victim’s prior sexual conduct.

(a) As used in this rule, unless the context otherwise requires, “sexual conduct” means deviate sexual activity, sexual contact, or sexual intercourse, as those terms are defined by Ark. Code Ann. § 5-14-101.

(b) In any criminal prosecution under Ark. Code Ann. § 5-14-101 et seq. or § 5-26-202, or for criminal attempt to commit, criminal solicitation to commit, or criminal conspiracy to commit an offense defined in any of those sections, opinion evidence, reputation evidence, or evidence of specific instances of the

victim's prior sexual conduct with the defendant or any other person, evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.

(c) Notwithstanding the prohibition contained in subsection (b) of this rule, evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person may be admitted at the trial if the relevancy of the evidence is determined in the following manner:

(1) A written motion shall be filed by the defendant with the court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence prohibited by subsection (b) of this rule and the purpose for which the evidence is believed relevant.

(2) (A) A hearing on the motion shall be held in camera no later than three (3) days before the trial is scheduled to begin, or at such later time as the court may for good cause permit.

(B) A written record shall be made of the in camera hearing and

shall be furnished to the appellate court on appeal.

(C) If, following the in camera hearing, the court determines that the offered proof is relevant to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence.

(3) (A) If the court determines that some or all of the offered proof is relevant to a fact in issue, the victim shall be told of the court's order and given the opportunity to consult in private with the prosecuting attorney.

(B) If the prosecuting attorney is satisfied that the order substantially prejudices the prosecution of the case, an interlocutory appeal on behalf of the state may be taken in accordance with Arkansas Rule of Appellate Procedure –Criminal 3.

(d) In the event the defendant has not filed a written motion or a written motion has been filed and the court has determined that the offered proof is not relevant to a fact in issue, any willful attempt by counsel or a defendant to make any reference to the evidence prohibited by subsection (b) of this rule in the presence of the jury may subject counsel or a defendant to appropriate sanctions by the court.

ARKANSAS RULES OF APPELLATE PROCEDURE –CRIMINAL

Rule 3. Appeal by state. (a) An interlocutory appeal on behalf of the state may be taken only from a pretrial order in a felony prosecution which (1) grants a motion under Ark. R. Crim. P. 16.2 to suppress seized evidence, (2) suppresses a defendant's confession, or (3) grants a motion under Arkansas Rule of Evidence 411(c) to allow evidence of the victim's prior sexual conduct. The prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that the appeal is not taken for the purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.

BROWN, GUNTER, and BAKER, JJ., dissent.

ROBERT L. BROWN, Judge, dissenting. I disagree with this court's summary refusal to amend Arkansas Rules of Appellate Procedure–Criminal 3(a) to allow the State of Arkansas to challenge adverse decisions in juvenile-transfer cases by interlocutory appeal. The decision by this court in a per curiam order without explanation goes against the recommendation of this court's Criminal Practice Committee. *See In re Recommendations of the Crim. Practice Comm.*, 2012 Ark. 295. It also is contrary to legislation which provides that "any party" may appeal from a juvenile-transfer order. *See Ark. Code Ann. § 9-27-318(l)* (Repl. 2009). And finally, it is contrary to our early caselaw. *See Hamilton v. State*, 320 Ark. 346, 896 S.W.2d 877 (1995); *see also Webb v. State*, 318 Ark. 581, 886 S.W.2d 624 (1994); *State v. Hatton*, 315 Ark. 583, 868 S.W.2d 492 (1994).

It is true that this court disallowed the State an interlocutory appeal in *State v. A.G.*, 2011 Ark. 244, ___ S.W.3d ___, because Rule 3(a) did not specifically authorize it when the General Assembly had.

Now, however, a rule change has been recommended to this court by our own Committee to authorize interlocutory appeals by the State in juvenile-transfer cases. I would adopt it. At the very least, in light of the history on this matter, I would explain why we are not doing so.

GUNTER and BAKER, JJ., join.